STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS (ON REMAND)
(Bandstra, P.J., Gage and Wilder, J.J.)

C.C. MID WEST, INC.,
a Michigan corporation,

Plaintiff-Appellant,

v.

HOWARD McDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA, individuals, jointly and severally,

Defendants-Appellees.
_____/

Supreme Court No. 123237

Court of Appeals Case No. 213386
(On Remand)

Oakland County Circuit Court
Case No. 97-550272-NZ
Hon. Denise Langford-Morris

BRIEF ON APPEAL – APPELLEES

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1. Did the Court of Appeals correctly hold that ERISA preempts C.C. Mid West's state law claims because they have an impermissible connection to an ERISA plan, where such claims arose out of and relate to:

(i) decisions made by ERISA fiduciaries concerning benefits available to ERISA Plan participants; and

(ii) communications by ERISA fiduciaries to Plan participants about benefits available to the participants?

Appellant answers:	No
Appellees answer:	Yes
The Court of Appeals answered:	Yes

2. Can C.C. Mid West escape ERISA preemption by alleging that the fiduciaries' benefit decisions and their communications with participants were motivated by malice and selfish interests?

Appellant answers:	Yes
Appellees answer:	No
The Court of Appeals answered:	No

3. Does the fact that C.C. Mid West is a non-ERISA entity that is not seeking benefits under an ERISA plan save its state law claims from preemption, where C.C. Mid West's claims require the court to examine whether Defendant's communications were appropriate or necessary under an ERISA plan?

Appellant answers:	Yes
Appellee answers:	No
Court of Appeals answered:	Did not address

INTRODUCTION

C.C. Mid West's complaint requires the examination of the ERISA plan that is administered by Defendants – ERISA fiduciaries. In particular, C.C. West asserts state law claims that directly challenge benefit decisions made by ERISA fiduciaries and communicated to ERISA plan participants. The Court of Appeals correctly held that C.C. Mid West's state law claims are preempted by ERISA because they would impermissibly require the court to examine the administration of benefits under the ERISA Plan. This Court should affirm.

C.C. Mid West attempts to circumvent the ERISA preemption by claiming that the ERISA fiduciaries had an ulterior motive for making their benefit determination. Regardless, of the ERISA fiduciaries' motivations, the facts are that the ERISA fiduciaries were making a benefit determination for Plan participants, which only tangentially affected C.C. Mid West.

Defendants, as ERISA fiduciaries, had a statutory obligation under ERISA to inform plan participants of matters that could affect their interests under the plan. *See* Varity Corp. v. Howe, 516 U.S. 489, 502; 116 S.Ct. 1065; 134 L.Ed.2d 130 (1996). The Court of Appeals also correctly held that Defendants were acting under legally mandated obligations to inform participants of their rights under the plan. The communications concerning pension benefits that the Defendants were obliged to make under ERISA are the same communications that C.C. Mid West is asserting as the basis for a tortious interference claim under state law. State law cannot prohibit what federal law requires.

That C.C. Mid West's state law claims rely on the administration of an ERISA plan is evidenced by the Complaint's allegations:

- To prevail on its state law claims, C.C. Mid West would be required to prove that an ERISA plan exists and that the ERISA fiduciaries

abused their duties. Indeed, the Complaint alleges these facts. *See* C.C. Mid West's Apx. 62a, 64a – 66a, Complaint, ¶¶ 3, 4, 13, 14, 20, 24, 25, 30.

- C.C. Mid West's fundamental problem is about a benefit determination made by Defendants, namely, the decision, communicated in the Fund's May 7, 1997, letter, that drivers would not be allowed to make "pension self-payments" if they worked for C.C. Mid West or other companies affiliated with Centra, Inc. *See* C.C. Mid West's Apx. 65a, Complaint, ¶¶ 24-25. The Complaint contends that this determination constituted tortious interference. **Clearly, C.C. Mid West would have no complaint if the Fund had reached the opposite conclusion concerning the pension benefits at issue in this case.** Thus, in essence, C.C. Mid West seeks to cause the Fund either to change its benefit determination or to punish the Fund if it does not change the benefit determination. As such, C.C. Mid West is making a disguised claim for benefits on behalf of drivers who participated in the Fund. However, ERISA specifically limits the class of persons who can sue for benefits; and, therefore, the state law claim clearly and directly conflicts with ERISA.

- The Complaint challenges the ERISA fiduciaries' "refusal to accept self-contributions from owner-operators," thus necessarily challenging the ERISA fiduciaries' determination of rights under an ERISA Plan. *See* C.C. Mid West's Apx. 66a, Complaint, ¶ 30.

- The Complaint alleges that "Defendants' wrongful conduct has no lawful connection with the purpose of the Pension Fund," thus necessarily requiring the Court to decide whether or not the Pension

Fund permitted the ERISA fiduciaries to act as they did. *See* C.C. Mid West's Apx. 67a, Complaint, ¶ 39.

- The Complaint challenges communications from the ERISA fiduciaries to plan participants, including a letter dated May 7, 1997, which described rights and benefits available under the Fund. *See* C.C. Mid West's Apx. 65a, 75a-76a, Complaint, ¶ 25 and Exhibit A to Complaint.

These allegations in the Complaint demonstrate, beyond doubt that C.C. Mid West seeks to impose state law liability on ERISA fiduciaries because they allegedly abused their ERISA duties, and thus seeks a remedy for breaches of fiduciary duty not found in ERISA itself. *See* Rush Prudential HMO, Inc. v. Moran, -- U.S. --; 122 S. Ct. 2151, 2166, 153 L.Ed.2d 375 (2002) (any state law "provid[ing] a form of ultimate relief in a judicial forum that add[s] to the judicial remedies provided by ERISA. . . . patently violates ERISA). Therefore, C.C. Mid West's state law claims arise "in connection with" an ERISA plan and "relate to" an ERISA plan. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138-139; 111 S. Ct. 478; 112 L.Ed.2d 474 (1990); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97; 103 S.Ct. 2890; 77 L.Ed.2d 490 (1983); California Division of Labor Standards Enforcement v. Dillingham Construction, 519 U.S. 316, 324-325; 117 S. Ct. 832; 136 L.Ed.2d 791 (1997) ; Wilson v. Zoellner, 114 F3d 713, 716 (8th Cir. 1997).

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. The Nature Of The Action

In an attempt to gain the advantages of having its drivers accrue additional benefits from the Central States Pension Fund without actually assuming the burden of participating in that Pension Fund, Plaintiff C.C. Mid West, Inc. ("C.C. Mid West") sues eight Trustees and the Executive Director of the Central States Southeast and Southwest Areas Pension Fund ("Pension Fund"). C.C. Mid West

has alleged tortious interference with contractual relations. The true purpose of the lawsuit is to force Plan defendants to allow C.C. Mid West's independent contractors to participate in the Pension Fund.[1]

The Pension Fund (also referred herein as the "Plan") is a non-profit "employee benefit plan" as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(3).[2] The defendant Trustees and Plan Administrator are all "fiduciaries" of the Plan as defined in Section 3(21) of ERISA, 29 U.S.C. § 1002(21).

The Complaint alleges that the fiduciaries acted unlawfully when they made decisions about benefits and when they communicated information about the Plan to participants of the Plan, including communication of a decision to deny certain Plan participants the right to make self-contributions so long as they were performing work for affiliates of CenTra, Inc. C.C. Mid West concedes that the fiduciaries were acting in their roles as administrators over the plan when they committed the alleged torts, but C.C. Mid West contends that this is irrelevant because the fiduciaries were motivated by selfish interests, including specifically a desire to harm C.C. Mid West.

II. The Allegations In C.C. Mid West's Complaint

The Pension Fund is a multiemployer pension plan that provides benefits to individuals covered by the collective bargaining agreements negotiated by the

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[1] This point is evident by the fact that if the ERISA Fiduciaries had determined that the Pension Plan allowed participation by independent contractors working for CenTra, Inc. affiliated companies, this lawsuit would not have been filed.

[2] Central States' trust funds have been established in accordance with Section 302 of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186, and Sections 402 and 403 of ERISA, 29 U.S.C. §§ 1102 and 1103. Central States Pension Fund v. Behnke, Inc., 883 F.2d 454, 459 (6th Cir. 1989).

Teamsters union. Contributions to the Plan are made pursuant to those collective bargaining agreements. *See* C.C. Mid West's Apx. 63a-64a, Complaint, ¶¶ 10-13, 16. During the period covered by the Complaint, the Plan was governed by a board of eight trustees, four appointed by employers and four appointed by the unions, representing employees of participating employers, as expressly authorized by § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5).

C.C. Mid West is a trucking operation and a wholly-owned subsidiary of CenTra, Inc. *See* C.C. Mid West's Apx. 63a, Complaint, ¶ 8. CenTra formerly owned Central Transport, Inc. ("Central Transport") – a company that participated in the plan until its shutdown in March 1997. *See* C.C. Mid West's Apx. 63a, Complaint, ¶ 9.

Approximately 235 former employees of Central Transport are participants in the Plan. *Sse* C.C. Mid West's Apx. 63a, Complaint, ¶ 10.

After Central Transport terminated the employment of these participants, the Plan permitted the former employees to make self-contributions to the Plan for a period of up to five years. *See* C.C. Mid West's Apx. 64a, Complaint, ¶ 16.

After Central Transport ceased operations, C.C. Mid West contacted some of Central Transport's former employees and "offered to negotiate and ultimately enter into independent contractor agreements" with them. *See* C.C. Mid West's Apx. 65a, Complaint, ¶ 19. C.C. Mid West actually entered into employment agreements with 59 former Central Transport employees. *See* C.C. Mid West's Apx. 65a, Complaint, ¶ 20.

In April 1997, representatives of the Plan met with the former Central Transport employees in Fort Wayne, Indiana, to describe how employment by C.C. Mid West would affect their rights under the Plan. *See* C.C. Mid West's Apx. 65a, Complaint, ¶ 24. On May 7, 1997, the Plan wrote the participants, who were

former Central Transport employees, to advise them about certain determinations which the Plan had taken with respect to their benefits and to encourage them to speak to a Plan representative to "determine how this will affect your benefit status. . . ." *See* C.C. Mid West's Apx. 65a, 75a-76a, Complaint, ¶ 25, and May 7, 1997, letter (attached as Exhibit A to the Complaint). The May 7, 1997, letter also stated:

> The Trustees also agreed to permit those participants who are on lay-off status as a result of Central Transport, Inc.'s shut-down to continue to make pension self-payments for a period of up to five (5) years provided that self-contributions will not be accepted for any period during which a participant is performing work for any company affiliated with either U.S. Truck Company, Inc. or CenTra, Inc.[3]

C.C. Mid West's Apx. 75a-76a, Exhibit A to Complaint.

In the letter, the Trustees explained that although they had never resolved their conflict with Central Transport over the company's drastic reduction of union employees prior to its March 31, 1997, shut down, they did not want to penalize the participants for the actions of the company. In addition, the letter advised the participants that the Trustees had authorized legal action against Central Transport. *See* C.C. Mid West's Apx. 75a-76a, Exhibit A to the Complaint.

The Complaint, ¶¶ 27-29, alleges that Central Transport's former employees and other "owner-operators through the trucking industry have been made aware of the threats." *See* C.C. Mid West's Apx. 66a, Complaint.

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[3] The Plan's reason for this decision were summarized by Judge Rosen's federal court decision: "According to Defendant, C.C. Mid West wanted the independent contractors to make their own pension contributions by means of the Self-Contribution provisions of the Fund's plan. Defendants claim that the Fund believed such contributions by employees working for an affiliate of CenTra would violate the Fund's plan and rules regarding self-contributions and adverse selection." C.C. Mid-West v. McDougall, 990 F.Supp. 914, 916 (1998).

Count I of the Complaint alleges that the Trustees' communications constitute "tortious interference with contractual relations." Paragraph 39 alleges that "Defendants' wrongful conduct has no lawful connection with the purpose of the Pension Fund." Count II of the Complaint alleges that the Trustees' communications constitute "tortious interference with business expectancies." Count III of the Complaint seeks exemplary damages. *See* C.C. Mid West's Apx. 67a, Complaint.

III. Proceedings Below

This case has an involved procedural history. On May 8, 1998, the Circuit Court granted Defendants' motion for summary disposition pursuant to MCR 2.116(C)(4) and (C)(8), holding that ERISA[4] preempted C.C. Mid West's state law claims.[5] *See* C.C. Mid West's Apx. 5a-7a and 25a-60a.

C.C. Mid West appealed. By an opinion and order issued on June 22, 2001, the Court of Appeals affirmed the Circuit Court (the "Original Opinion"). Relying on the allegations of the Complaint, including the ERISA fiduciaries' May 7, 1997, letter which was attached to the Complaint, the Court of Appeals held that C.C. Mid West failed to state a claim for tortious interference because Defendants were motivated, at least in part, by legitimate business reasons. Thus, the Court held that Defendants were entitled to summary disposition pursuant to MCR 2.116(c)(8).

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4 *See* Providence Hospital v. National Labor Union Health & Welfare Fund, 162 Mich. App. 191, 200; 412 N.W.2d 690 (1987) (ERISA preempted state law claims and, therefore, the circuit court lacked jurisdiction over the subject matter, requiring dismissal under MCR 2.116(C)(4)).

5 Defendants subsequently removed this case to federal district court. Because Plaintiff's complaint asserted solely state law claims and because ERISA did not provide Plaintiff an opportunity to bring a civil enforcement action under § 1132(a), the court held that this case was not removable. *See* C.C. Mid West v. McDougall, 990 F.Supp 914, 924 (1998).

Further, the Court of Appeals recognized that Defendants were acting under legally mandated obligations to inform their participants of their rights under the ERISA plan, but did not explicitly hold that C.C. Mid West's claims were preempted. *See* C.C. Mid West's Apx. 11a-16a.

On July 22, 2002, this Court vacated the Court of Appeals decision, and remanded the case so that the Court of Appeals could decide the preemption issue. C.C. Mid West v. McDougall, 466 Mich. 894; 649 N.W.2d 75 (2002). *See* C.C. Mid West's Apx. 17a.

By an opinion dated January 17, 2003, the Court of Appeals held that C.C. Mid West's claims were preempted by ERISA and again affirmed the Circuit Court's dismissal of C.C. Mid West's claim (the "Remand Opinion"). The Remand Opinion, p. 5, explained the basis for this conclusion:

> [D]efendants, as fiduciaries of the Pension Fund had a statutory obligation under ERISA to inform plan participants of matters that could affect their interest under the Plan.
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> * * *
>
> As we did in our first opinion, we again conclude that defendants' actions were undertaken as fiduciaries of the Pension fund. By law, defendants had a duty to inform the plan participants of their rights under the plan and how those rights may be affected by certain employment contracts. *Varity, supra; In re Childress Trust, supra.* The meeting held with and the letter sent to the plan participants by defendants informed the plan participants to contact the Pension Fund's toll free number in order to find out how their decisions may impact benefits. The trial court did not err by concluding that even if the administration of the fund was malicious as alleged by plaintiff, the manner in which the Pension Fund was administered is a critical factor in plaintiff's claims and thus plaintiff's claims are subject to preemption. *See Ingersoll-Rand Co. v. McLendon*, 498 U.S. 133, 139-140; 111 S.Ct. 478; 112 L.Ed.2d 474 (1990).

C.C. Mid West's Apx. 23a, Remand Opinion, p. 5.

C.C. Mid West filed leave to appeal and this Court granted leave in an order dated November 6, 2003.

ARGUMENT

I. Summary of the Argument

The Court of Appeals correctly concluded that C.C. Mid West's state law claims were preempted by ERISA because they have an impermissible connection with an ERISA plan. Although C.C. Mid West cannot argue that it challenges decisions and communications by ERISA fiduciaries, C.C. Mid West has attempted to circumvent preemption by arguing that the ERISA fiduciaries were engaged in a vendetta against C.C. Mid West and because they did not convey actual Plan information to the participants.

Those allegations, even if true, cannot avoid preemption. As the Court of Appeals correctly held, consideration of C.C. Mid West's claims would necessarily require an examination of the way in which the Plan was administered and thus thwarted the fundamental policies embodied in ERISA's preemption provision. Taken to the logical conclusion, **if C.C. Mid West were allowed to bring its state law claims and prevail, the Plan would be required to either change its benefit determinations or be penalized for not changing them.** Nothing could relate more to or be connected with an ERISA plan as basic benefit determinations. In essence, C.C. Mid West is attempting to mandate benefits, in the form of allowing them to self-contribute, for those Plan participates C.C. Mid West hired or intends to hire.

As the Court of Appeals below also recognized (C.C. Mid West's Apx. 23a, Remand Opinion, p. 5), once a pension benefits determination has been made by the plan fiduciaries, the fiduciaries have an obligation under ERISA to **communicate**

that decision to the affected plan participants. But here C.C. Mid West is alleging that the Trustees' communication of their decision concerning plan benefits constituted an actionable "tortious interference" under state law. Thus C.C. Mid West's interpretation of state law puts state law in direct **conflict** with the requirements of ERISA. In some cases it may be difficult to ascertain whether an application of state law "relates" to an employee benefit plan, within the meaning of the broad ERISA preemption provision (29 U.S.C. § 1144(a)). However, where, as in this case, a proposed application of state law would **conflict** with ERISA, there can be no doubt that Congress intended that state law would be preempted.

With the passage of ERISA, Congress intended that plans and fiduciaries be governed by a uniform federal administrative scheme to avoid the risk that state law might impose new and different standards on ERISA plans and fiduciaries. To avoid possibly inconsistent regulation, courts have routinely found that state law tort claims, including tortious interference claims,[6] are preempted, **even when ERISA preemption leaves the plaintiff without any remedy**. *See* C.C. Mid West's Apx. 24a, Remand Opinion, p. 6.

Further, there are no genuine issues of material fact remaining. The facts are that Defendants made a beneficiary determination that was communicated to

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[6] Decisions preempting tortious interference claims include Garren v. John Hancock Mutual Life Ins. Co., 114 F.3d 186, 187-188 (11th Cir. 1997) (state tortious interference with contract law claims are preempted by ERISA when the claim involves the proper administration of a plan or affects the relationship between ERISA entities); Brinker v. Michigan Bell Tel. Co., 152 Mich.App. 729, 732-733, 394 N.W.2d 88 (1986); Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812 (9th Cir. 1992); Maciosek v. Blue Cross & Blue Shield, 930 F.2d 536 (7th Cir. 1991); Tingey v. Pixley-Richards West, Inc., 953 F.2d 1124, 1131 (9th Cir. 1992); Hospital Corp. of Am. v. Pioneer Life Ins. Co., 837 F.Supp. 872, 874 (W.D. Tenn. 1993) ("Courts have repeatedly held that ERISA preempts state law claims for tortious interference with contract.").

Pension Fund participants, which happened to affect C.C. Mid West. No facts remain to resolve the preemption issue. Defendants' motivation or interests in administering the Pension Plan are irrelevant to the analysis of whether C.C. Mid West's tortious interference claim "relates to" or is clearly connected with the administration of an ERISA plan.

II. C.C. Mid West's Claims Are Preempted Because They Necessarily Relate To And Interfere With Administration Of An ERISA Plan

A. The Broad Scope Of ERISA Preemption

The scope of federal preemption in matters relating to ERISA plans is broad.[7] Even though ERISA is a federal statute, it provides for concurrent jurisdiction in federal and state courts to decide many ERISA issues. *See* ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). Furthermore, because ERISA preemption often is raised as a defense to state law claims, Michigan courts have often been called upon to decide whether a state law claim is preempted. ACIA v. Frederick & Herrud, Inc., 443 Mich. 358, 373-386; 505 N.W.2d 820 (1993) (provision of No-Fault statute preempted); Yerkovich v. AAA, 231 Mich. App. 54, 67; 585 N.W.2d 318 (1998) (ERISA preempts Section 3116 of the Michigan No Fault Act); Providence Hospital, 162 Mich. App. at 195-199 (hospital's breach of contract claim "preempted" even though complaint did not mention ERISA); Brinker v. Michigan Bell Tel. Co., 152 Mich. App. 729, 732-733, 394 N.W.2d 88 (1986) (common law claims, including tortious interference claim).

In ERISA, Congress set out to

> . . . protect . . . participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to

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[7] The breath of preemption even includes cases that do not deal directly with the subject matter of ERISA. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98; 103 S.Ct 2890; 77 L.Ed.2d 490 (1983).

> participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal courts.

ERISA, § 2, 29 U.S.C. § 1001(b) (Emphasis added).

In Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44; 107 S.Ct. 1549; 95 L.Ed.2d 39 (1987), the United States Supreme Court observed: "Congress capped off the massive undertaking of ERISA with three provisions relating to the preemptive effective of the federal legislation." One of these provisions is Section 514(a), which provides:

> Except as provided in subsection (b)[8] of this section, the provisions of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws[9] insofar as they may now or hereafter relate to any employee benefit plan. . . .

The words "relate to" in ERISA Section 514(a) have an expansive meaning. As Pilot Life stated:

> In both Metropolitan Life, *supra*, and Shaw v. Delta Air Lines, . . . we noted the expansive sweep of the preemption clause. In both cases "[t]he phase 'relate to' was given its broad common-sense meaning such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" In particular we have emphasized that the preemption clause is not limited to "state laws specifically designed to affect employee benefit plans."

481 U.S. at 48 (Citations omitted). *See also* ACIA, 443 Mich. 358 at 373-386 (1993) (emphasizing the expansive scope of the "relates to" language in ERISA and

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8 Subsection (b), commonly called the "savings clause," provides that ERISA shall not be construed to exempt any person from any State law that regulates insurance, banking or securities. Therefore, it does not apply to this case.

9 The words "State laws" in Section 514(a) refer not only to state statutes but also state case law and state common law. Blakeman v. Mead Containers, 779 F.2d 1146, 1151 (6th Cir. 1985); Brinker, 152 Mich. App. at 732.

explaining "Congress made clear its intention to make federal law and policy supreme in the ERISA context."); Brinker, 152 Mich. App. at 732-733 (commenting of the broad sweep of the "relates to" language and finding that common law claims, including a claim for tortious interference, related to an ERISA plan); Providence Hospital, 162 Mich. App. at 198 (quoting Pilot Life on ERISA's "extraordinary preemption power").

In New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645; 115 S.Ct. 1671, 1678; 131 L.Ed.2d 695 (1995), the United States Supreme Court reaffirmed the expansive reach of ERISA preemption to state laws that mandate the structure or administration of employee benefit plans, and explained that this broad preemption is necessary:

> to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

514 U.S. at 656-657.

In doing so, the Supreme Court relied on its decision in Ingersoll-Rand Co. v. McClendon, 498 U.S. 133; 111 S.Ct. 478; 112 L.Ed.2d 474 (1990),[10] which held that

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10 In Ingersoll-Rand, 498 U.S. at 135-36, the Court was asked to decide whether ERISA preempted a state common law tortious interference claim where an employee alleged that his employer unlawfully discharged him, four months prior to the vesting of his pension rights, to avoid making contributions to his pension fund. Under Texas common law, an employee could recover when the principal reason for termination was the employer's desire to avoid contributing to or paying benefits under the pension fund. 498 U.S. at 140. The Court stated "the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension plan itself." 498 U.S. at 139-40. The Court concluded that "in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment."

a Texas common law claim disguised to protect ERISA beneficiaries was preempted because:

> Allowing state based actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those Congress sought to foreclose through § 514(a). Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.

498 U.S. at 142.

So too, state laws which affect communications between ERISA fiduciaries and plan participants must be tested solely by federal law because allowing state law claims based on such communications would be fundamentally at odds with the goal of uniformity that Congress sought to implement. *See* Varity and Farr, *supra.*

A state law may "relate to" an employee benefit plan and thereby be preempted, even if the law is not specifically designed to affect such plans, and even if the effect is indirect. District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 129-130; 113 S.Ct. 580; 121 L.Ed.2d 513 (1992), *citing* Ingersoll-Rand, 498 U.S. at 139; Zuniga v. Blue Cross & Blue Shield of Michigan, 52 F.3d 1395, 1401 (6th Cir. 1995), *quoting* Ingersoll-Rand, 498 U.S. at 139.

As the Court explained in Simas v. Quaker Fabric Corp. of Fall River, 6 F.3d 849, 852 (1st Cir. 1993):

> [A] state law may relate to an employee benefit plan even though it does not conflict with ERISA's own requirements, and represents an otherwise legitimate state effort to impose or broaden benefits for employees. As we recently summarized the law, ERISA preempts all state laws insofar as they relate to employee benefit

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498 U.S. at 140.

> plans, even laws which are "a help, not a hindrance," to such plans, and regardless of whether there is a "comfortable fit between a state statute and ERISA's overall aims." [Emphasis added. Citations omitted.]

ERISA preempts claims involving a non-ERISA entity where it directly or indirectly affects the relationships between an ERISA plan and its participants. Garren, 114 F.3d at 187; Zuniga, 52 F.3d at 1401. As the Ninth Circuit explained in General American Life Ins. Co. v. Castonguay, 984 F.2d 1518, 1521-1522 and n. 4 (9th Cir. 1993):

> Because state laws regulating these relationships [between ERISA entities] (or the obligations flowing from these relationships) are particularly likely to interfere with ERISA's scheme, these laws are presumptively preempted. * * * A law is preempted if it regulates any of the relationships regulated by ERISA, regardless of whether it also regulates other relationships with which ERISA isn't concerned.

In General American Life, the Ninth Circuit found that ERISA preempted a California statute that subjected trustees to personal liability on account of things they did to discharge their responsibility to their respective trusts. An insurance company that had contracted with the trust brought the claim. The Ninth Circuit explained:

> Under this approach, the first question we must ask is whether the state law reaches a relationship that is already regulated by ERISA. It doesn't matter whether the state law regulates the relationship directly (by telling the parties what they can or cannot do), or indirectly (by imposing on the parties extra duties that flow from their conduct in this relationship). Any regulation of the relationship is basis enough for preemption.
>
> Here, the state law subjects trustees to personal liability on account of things they do in discharging their responsibility to the trust. ERISA already regulates the trust-trustee relationship. * * * And Cal.Prob.Code § 18000 certainly regulates this relationship, because it imposes an extra burden on trustees by virtue of their part in the relationship. This burden affects the trustees' conduct just as surely as direct regulation would; a trustee exposed to

> additional personal liability for his acts as trustee may act much more timidly than one who's immunized from such liability. * * *
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> Because the state law here regulates one of the relationships regulated by ERISA, we must give effect to ERISA's broad preemption clause. The liability of the trustees in this case must be governed by federal, not California, law.

984 F.2d at 1522 (Emphasis added).

In Central States, Southeast and Southwest Areas Health and Welfare Fund v. Borden, Inc., 736 F.Supp. 788, 791 (N.D. Ill. 1990), Bordon argued that Central States' efforts to collect health and welfare contributions constituted tortious interference with Bordon's collective bargaining agreements with the Union. The court granted Central States' motion to dismiss finding that the claims were preempted because the "conduct challenged was part of the administration of an employee benefit plan." 736 F.Supp. at 791. *See also* Pane v. RCA Corp., 868 F.2d 631, 634-635 (3d Cir. 1989) (holding state claims for breach of contract, breach of covenants of good faith and fair dealing, and intentional infliction of emotional distress arising out of "the administration of an ERISA employee benefit plan" were preempted); Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272 (6th Cir. 1991) (health care provider's state law claims of promissory estoppel, breach of contract, negligent misrepresentation and breach of good faith preempted).

B. There Has Been No Fundamental Shift In Decisions Construing The Broad Scope Of ERISA Preemption

C.C. Mid West continues to maintain that ERISA does not preempt its common law claims because, since 1995, the Supreme Court has scaled back § 514 preemption dramatically – this is simply not true. C.C. Mid West's argument ignores the fact that the Circuit Court specifically relied on the Supreme Court's 1997 decision in DeBuono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806; 117 S.Ct. 1747; 138 L.Ed.2d 21 (1997), and thus applied the correct test even if there had been some dramatic change in law.

Likewise, a careful review of the cases relied upon by C.C. Mid West proves that there has been no change in law. Rather, the Supreme Court emphasized that, "[i]n our earlier ERISA pre-emption cases, it had not been necessary to rely on the expansive character of ERISA's literal language in order to find pre-emption because the state laws at issue in those cases had a clear 'connection with or reference to,' ERISA benefit plans." 520 U.S. at 812-813; 117 S.Ct. at 1751. In the recent cases, the Supreme Court has been called upon to examine different factual situations, and in that context it has recognized that it is not appropriate to extend the "relate to" language to "the furthest stretch of its indeterminacy. . . ." Id. However, these same cases have continued to restate and rely upon the tests that it used in the earliest pre-emption cases, such as Ingersoll-Rand. Thus, as the Circuit Court correctly observed, DeBuono confirmed that ERISA would preempt claims where "the existence of a pension plan is a critical element of the state law cause of action." 520 U.S. at 813-814; 117 S.Ct. at 1752.

In other words, the Supreme Court continues to hold that ERISA preempts state laws which have a "clear connection with or reference to" ERISA plans, but ERISA does not preempt laws which have a remote or tenous connection with ERISA plans. *See* DeBuono; California Division of Labor Standards Enforcement v. Dillingham Construction, 519 U.S. 316; 117 S.Ct. 832; 136 L.Ed.2d 791 (1997); [11]

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[11] In Dillingham, the United States Supreme Court held that California's prevailing wage law was not preempted by ERISA. In doing so, the Supreme Court stated that it would "look" both to ERISA's objectives as a guide to the scope of the state law that Congress understood would survive, and to the nature of the law's effect on ERISA plans. . . ." It found that a California law was not preempted because it "does not bind ERISA plans — legally or as a practical matter — to anything." Dillingham emphasized that ERISA would preempt a state law which affected the "fiduciary duty requirements" of ERISA. 136 L.Ed.2d at 802-803.

and New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645; 115 S.Ct. 1671; 131 L.Ed.2d 695 (1995).[12]

The Supreme Court also continues to emphasize the need to consider carefully "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." DeBuono, 138 L.Ed.2d at 29. That, of course, is the precise test used by the Circuit Court in this case. It is the test that this Court used in decisions like Brinker and Providence Hospital. It is also the test used by the lower court cases relied upon by C.C. Mid West's Brief.

Using these tests, DeBuono, Dillingham, and New York State Conference, it can be concluded that ERISA did not preempt the specific state laws at issue because those state laws did not compel ERISA plans to do anything in particular, they merely affected the costs incurred by ERISA plans if they chose to take a particular course of action.

Here, the Court of Appeals correctly found that the existence of a pension plan is "a critical element" of C.C. Mid West's state law cause of action. It would be impossible for C.C. Mid West to prove its claim without evaluating the structure and workings of an ERISA plan, specifically how and why the fiduciaries made decisions with respect to benefits and how and why the fiduciaries communicated with participants about those benefits. This point is demonstrated conclusively by C.C. Mid West's reliance on the testimony of Central States' general counsel, Mr. Nyhan, concerning the fiduciaries' decision making process and their communications with Plan participants.

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12 In New York State Conference, the United States Supreme Court held that ERISA did not preempt a New York statute that imposed surcharges on hospitals' commercially insured patients and health maintenance organizations. In doing so, the Supreme Court specifically referred to, and confirmed, its decision in Ingersoll-Rand. *See*, 131 L.Ed.2d at 706.

Thus, this case is distinguishable from Inverness Corp. v. McCullough, 1999 WL 1225231, 1999 US Dist Lexis 19557 (D.Mass. 1999), cited by C.C. Mid West. In Inverness, the plaintiffs entered into an investment with an ERISA plan. The plaintiffs alleged that the defendants, who were also trustees of the ERISA plan, caused a premature termination of the investment; and, in order to do so, they made false statements about plaintiffs to third party corporations and financial institutions. The plaintiffs brought common law tort claims. The complaint did not allege that the defendants were making benefit determinations or communicating with plan participants about benefits; and, as the District Court also concluded: "To decide this cause of action, there is no need to interpret the ERISA plan" and "this is not a case 'in which the existence of a pension plan is a critical element of a state law cause of action. . . .'" 1999 WL 1225231 at *4. Thus, the District Court held that the state law claims were not preempted.

Here, the Court of Appeals correclty held that an ERISA plan is a critical element of C.C. Mid West's state law claim. Critical to C.C. Mid West's claims is whether the Plan inproperly interferred with C.C. Mid West's relationship with its independent contractors. To determine whether this was unlawful interferrence, the Court must examine the Defendants' actions and, more specifically, they had a legitiment reason for taking that action. Jim-Bob, Inc. v. Melching, 178 Mich.App. 71, 95-96; 443 N.W.2d 451 (1989). Hence, the question is whether the Defendants properly determined that Plan participants could not self-contribute if employed by a CenTra affiliated company and whether the communication of that determination was proper. As the lower courts found, allowing C.C. Mid West to pursue its state law claim would necessarily interfere with the workings of an ERISA plan by subjecting the trustees to the risk of different state standards, thus creating a state law obstacle to the accomplishment of the full purposes and objectives of Congress. Ingersoll-Rand, 498 U.S. at 142, quoted at p. 14 *supra*.

Even if C.C. Mid West were allowed to bring its state law claims, "the existence and administration of the Fund is a critical element of Plaintiff's claim." C.C. Mid West's Apx. 51a, Summary Disposition Hearing Transcript, p. 27. Worse, as the Circuit Court also correctly held, "the relief sought by the C.C. Mid West would require the Defendants to either change their benefit determinations or would penalize the Defendants for their failure to change them." C.C. Mid West's Apx. 52a, Summary Disposition Hearing Transcript, p. 28.

Nothing would more clearly frustrate Congress' intention that federal, not state law, govern fiduciary conduct and plan administration. Nothing would more clearly subject ERISA plans and ERISA fiduciaries to the risk of conflicting regulation. Thus, as both the Circuit Court and Court of Appeals properly found, even allegations that the Trustees acted maliciously cannot avoid ERISA preemption of C.C. Mid West's state law claims.

Thus, by arguing that it seeks to prove self-interest, C.C. Mid West's Brief effectively concedes the critical point: ERISA, not state law, must serve as the standard. The Court is only permitted to review the fiduciaries' conduct by referring to the fiduciary standards in ERISA. Any attempt to use state law to do so — e.g. deciding a tortious interference claim — would necessarily and impermissibly expose the fiduciaries to conflicting standards in violation of Congress' mandate that an ERISA plan or its fiduciaries not be subject to conflicting regulations. *See* Ingersoll-Rand and New York State Conference, quoted at p. 13, *supra*.

Therefore, whether one uses new or old decisions, the same conclusion results: ERISA preempts C.C. Mid West's state law claims.

C. *C.C. Mid West Complains About The Exercise of Core ERISA Duties By ERISA Fiduciaries*

As the Supreme Court has observed, ERISA is a "comprehensive and reticulated statute," the product of a decade of Congressional study of the nation's private employee benefit system. Nachman Corp. v. Pension Benefit Guaranty Corporation, 446 U.S. 359, 361; 100 S.Ct. 1723 1726; 64 L.Ed.2d 354 (1980). The statute assigns ERISA fiduciaries a number of detailed duties and responsibilities, which include "the proper management, administration, investment of [plan] assets, the maintenance of proper records, the disclosure of specific information and the avoidance of conflicts of interests." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142-143; 105 S.Ct. 3085, 3090; 87 L.Ed.2d 96 (1985); *see also* 29 U.S.C. § 1104(a). However, the fiduciary responsibility provisions of ERISA are limited by their very terms to fiduciaries.

The Court of Appeals correctly concluded, defendants' actions "were undertaken as fiduciaries of the Pension Fund." C.C. Mid West's Apx. 23a, Remand Opinion, p. 5. C.C. Mid West contends that there were no uncontested pleadings or evidence to support the Court of Appeal's conclusion that the Defendants acted as fiduciaries in making the employee benefit plan decisions and communications at issue in this case. (C.C. Mid West Brief, p. 44.) But the entire thrust of the Complaint in this action is that the Defendants allegedly **abused** their fiduciary function and made a benefit determination for the sole purpose of causing injury to C.C. Mid West. It should be recalled that the operative communication in this case – the Defendants' May 7, 1997 letter that is alleged as the entire basis of C.C. Mid West's tortious interference claim and is attached as Exhibit A to C.C. Mid West's Complaint – plainly and on its face relates to a pension benefits determination made by the Defendants. The Defendants' May 7, 1997 letter addressed to the Pension Fund participants affected by the shutdown of C.C. Mid West states:

> The Trustees ... **agreed to permit** those participants who are on lay-off status as a result of Central Transport, Inc.'s shutdown to continue to make pension self-payments ... provided that self-contributions will not be accepted for any period during which a participant is performing work for any company affiliated with either U.S. Truck Company, Inc. or CenTra, Inc.

C.C. Mid West's Apx. 75a-76a, Exhibit A to Complaint (emphasis added).

The Trustees could **only** "agree" to this type of benefit determination in their capacities as ERISA fiduciaries.[13]

Moreover, ERISA 3(21)(A) provides that a person is a fiduciary with respect to the plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets. . . (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. This test is "functional," that is, "a person is a fiduciary 'to the extent that' he performs one of the described duties; people may be fiduciaries when they do certain things but entitled to act in their own interests when they do others." John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank, 510 U.S. 86; 114 S.Ct. 517, 126 L.Ed.2d 524 (1993). *See also* Beddall v. State Street Bank and Trust Co., 137 F.3d 12 (1st Cir. 1998) ("fiduciary status is not an all or nothing proposition");

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[13] C.C. Mid West also suggests that no benefit determination was made because **none** of the Central Transport employees affected by the shutdown of that company qualified to make self-contributions **regardless** of where they went to work after the Central Transport shutdown. (C.C. Mid West, p. 42.) But there was a degree of ambiguity surrounding the self-contribution rights of those affected by the Central Transport shutdown. (*See infra* p. 29.) The Trustees' decision (communicated in their May 7, 1997 letter) was that with respect to any Central Transport drivers who **otherwise** qualified to make self-contributions (because they remained on lay-off status and had not completely terminated their employment relationship with Central Transport), continuation of the right to make self-contributions hinged upon avoiding returning to work with a CenTra affiliate.

Hozier v. Midwest Fastners, 908 F.2d 1155, 1158 (3rd Cir. 1990) ("[f]iduciary duties under ERISA attach not to just particular persons, but to particular persons performing a particular function"). Thus, the test for determining what constitutes fiduciary conduct governed by ERISA hinges upon what an individual does (his or her "function"), not, as C.C. Mid West urges upon the individual's **intent** (e.g., whether the individual acted with an improper motive).

Thus, the courts must look at the conduct at issue in order to ascertain if the actor is an ERISA fiduciary and therefore subject to ERISA's regulatory scheme. In Varity, *supra*, an employer distributed materials and held a meeting in which it convinced some 1,500 employees to voluntarily transfer to a new subsidiary by intentionally misrepresenting the subsidiary's financial viability and the future security of the participants' benefits, should they accept the transfer. Although the employer contended he was acting as a plan settlor and therefore not subject to ERISA's regulatory reach, the district court held that the employer was acting as an ERISA fiduciary in making these communications since the communications were "about benefits." The Eighth Circuit and Supreme Court affirmed. The Supreme Court stated that "[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power 'appropriate' to carrying out an important plan purpose," *citing* Restatement (2d) of Trusts, § 164 (1957). The Court noted that ERISA itself requires administrators to give beneficiaries information about the plan, and was also persuaded by the fact that the individuals communicating the plan information were among those who "had authority to communicate as fiduciaries with plan beneficiaries."

Varity demonstrates, as the Court of Appeals found, that the very act complained of by C.C. Mid West — communicating with plan participants by persons with authority to communicate for the plan about plan benefits — is not an

act incidental to fiduciary conduct but rather **is a core fiduciary act which carries out "an important plan purpose" which renders the individual a "fiduciary" and therefore, subject to the fiduciary responsibility provisions and regulatory scheme of ERISA Section 404.** *See* C.C. Mid West's Apx. 23a, Remand Opinion, p. 5; Bixler v. Central Pennsylvania Teamsers Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993) (emphasizing that a positive "duty to inform participants about benefits is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when a Trustee knows that silence might be harmful").

C.C. Mid West argues that Defendants can be subjected to state law liability because they acted maliciously and for an ulterior purpose not sanctioned by ERISA. But that argument misunderstands the scope of ERISA and, therefore, ERISA preemption. At best that argument proves that Defendants breached their fiduciary duty. Such a claim is expressly governed by ERISA and a claim that may only be brought by plan participants or beneficiaries. This is illustrated in Varity, where the plan sponsor misrepresented information to the plan participants for its own interest. The fact that they engaged in misrepresentations did not remove these communications from ERISA; rather the fact that the fiduciary acted out of self-interest resulted in a violation of the duty of loyalty established by ERISA Section 404(a).[13]

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[13] For other cases finding that ERISA fiduciaries breached their duties by making misleading communications to plan participants, or by failing to communicate with plan participants, *see* Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154 (6th Cir. 1988) (material misrepresentations concerning the availability of enhanced benefits in the future could form the basis for fiduciary liability); Taylor v. Peoples Natural Gas Co., 49 F.3d 982 (3rd Cir. 1995) (plan administrator can be held liable for breach of fiduciary duty for misrepresentations by company employee responsible for benefit matters); Eddy v. Colonial Life Ins. Co., 919 F.2d 747 (D.C. Cir. 1990) (the

ERISA case law makes clear that the very act of communication by plan officials to plan participants about plan benefits is a fundamental exercise of fiduciary responsibility serving an important plan purpose which is extensively regulated by ERISA Section 404(a). Courts are constantly called upon to define the exact parameters of the fiduciary' responsibility to communicate (i.e., what needs to be communicated, when, how and with whom) as well as the appropriate sanction for failing to communicate.

Permitting C.C. Mid West to bring a state law cause of action premised upon a fiduciary act so extensively regulated by ERISA would run the substantial risk of creating conflicting state and federal regulations over ERISA plans and ERISA fiduciaries. Federal law requires plan fiduciaries to timely communicate material information affecting the interest of the beneficiaries and to do so solely by considering the interest of the plan and its beneficiaries. This means that, as a matter of federal law, the ERISA fiduciaries must disregard the interests of third parties such as C.C. Mid West. If those parties could bring state law claims holding ERISA fiduciaries responsible for failing to consider their interests, then the ERISA fiduciaries would be subjected to a clearly inconsistent standard of conduct and they could be punished under state law because they performed their duties under federal law.

"fundamental common law duty" of a trustee is to disclose material information affecting a beneficiary, therefore, the plan administrator had an affirmative duty to disclose to the participant information that was not specifically requested by the participant); Jordan v. Federal Express Corp., 116 F.3d 1005 (3rd Cir. 1997) (failure to inform employee that his selection of joint and survivor annuity was irrevocable stated a claim for breach of fiduciary duty); Switzer v. Wal-Mart Stores, Inc., 52 F.3d 1294, 1299 (5th Cir. 1995) (upon receiving an inquiry from a beneficiary, a plan administrator "has a fiduciary obligation to respond promptly and adequately in a way that is not misleading"); Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 991 (7th Cir. 1993) ("Fiduciaries must also communicate material facts affecting the interest of beneficiaries. This duty exists when a beneficiary asks fiduciaries for information and even when he or she does not.").

Merely subjecting the ERISA fiduciaries to a fear that they might be subjected to state law liability thus has the effect of regulating the ERISA fiduciaries and the ERISA plan — something completely inconsistent with Congress' intention when it enacted ERISA.

D. State Laws Are Preempted Even If They Do Not Expressly Reference An ERISA Plan If, As Applied, They "Relate To" An ERISA Plan

State common law claims can "relate to" an ERISA plan even if, by its terms, it does not refer to an ERISA plan. *See* Zuniga, 52 F.3d at 1399-1400. If a state common law claim could be preempted only if the common law refers specifically to ERISA, it would be impossible to preempt state contract, fraud or negligence claims — yet courts do so all the time. This is because those claims, **as applied to an ERISA plan**, "relate to" and have "a connection with" the ERISA plan.

Thus, the Court of Appeals correctly found that C.C. Mid West's claims relate to, and have a connection with, an ERISA plan because C.C. Mid West's claim makes no sense without reference to an ERISA plan and because C.C. Mid West specifically seeks to hold the plan fiduciaries liable for decisions they made while acting, or — accepting C.C. Mid West's view — purporting to act, in their fiduciary capacity.

There is nothing novel about this analysis. For example, in Shaw, 463 U.S. at 97 n. 17, the United States Supreme Court observed that, even if a state law does not have an express connection with an employee benefit plan, ERISA preempts the state law "insofar as" the law applies to benefit plans in particular cases.[14]

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[14] *See also* Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1329 (5th Cir. 1992) (ERISA preempts not only laws which are specifically designed to affect ERISA plans but also laws of general application "which, when applied in particular settings, can be said to have a connection with or a reference to an ERISA Plan").

Similarly, in ACIA, 443 Mich. at 373-386 (1993), this Court held that the "coordination of benefits" provision in the Michigan No Fault Law was preempted by ERISA. The state law did not specifically refer to ERISA plans, but the plaintiff was seeking to have the state law applied to an ERISA plan. In Authier v. Ginsberg, 757 F.2d 796 (6th Cir. 1985), the Sixth Circuit held that a state law employment discrimination claim was preempted because "**as applied in this case**, the action relates to an ERISA pension plan." (Emphasis added.) And, in Brinker, this court preempted state common law claims because, as applied, they related to an ERISA plan.

In Providence Hospital, the hospital claimed that an ERISA fund had failed to pay benefits due to the hospital's patients. The patients assigned their benefit claims to the hospital, and the hospital sued the ERISA fund for breach of contract. The complaint did not mention ERISA, nor did it specifically allege a violation of ERISA. 162 Mich. App. at 195. The ERISA plan argued that the complaint was still preempted because "the proper review of this case by the trial judge should have been whether the trustees violated their duties as defined in ERISA." *Id.* The Court of Appeals agreed, and it held that the state law claims were preempted. In doing so, this Court stated that "even a state's general common law will be preempted by ERISA if, **in its present application**, the common law 'relates to' an employee benefit plan." Providence Hospital, 162 Mich. App. at 196 (emphasis added).

E. The Application Of State Law Requested by C.C. Mid West Will Conflict With The Duties of the Pension Fund's Fiduciaries

Even in the absence of an express statutory clause preempting state laws that "relate to," or have "connection with" ERISA plans, the Supremacy Clause of the United States Constitution (Art. VI, c. 2) preempts state law to the extent it creates a conflict with ERISA. "Conflict preemption is compelled not only when a

state law is in conflict with a federal statute, but also when it conflicts with a valid federal regulation." Boulahanis v. Prevo's Family Market, Inc., 230 Mich.App. 131, 135, 583 N.W.2d 509 (1998). *See also* Crosby v. National Foreign Trade Council, 530 U.S. 363, 372; 120 S.Ct. 2288 (2000) ("Even without an express provision for preemption, ... state law must yield to a Congressional Act" if state law "**conflict(s)** with a federal statute") (emphasis added).

As the U.S. Supreme Court has stated:

> We can begin, and in this case end, the analysis by simply asking if state law **conflicts** with the provisions of ERISA or operates to frustrate its objects. We hold that there is a **conflict** which suffices to resolve this case. We need not inquire whether the statutory phrase **"relates to"** provides further and additional support for the preemption claim.

Boggs v. Boggs, 520 U.S. 833, 841; 117 S.Ct. 1754 (1997) (emphasis added). See also Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142; 111 S.Ct. 478 (1990) ("Even if there were no express preemption in this case, the Texas cause of action would be preempted because it **conflicts** directly with an ERISA cause of action.") (emphasis added).

As the Court of Appeals observed in this case:

> [D]efendants as fiduciaries of the Pension Fund had a statutory obligation under ERISA to inform plan participants of matters that could affect interest under the plan.

C.C. Mid West's Apx. 23a, Remand Opinion, p. 5.

The Court of Appeals noted that the Defendants made a decision concerning the availability of self-payments under the plan, and they were obliged under ERISA to communicate that benefits decision to the participants. Id., citing Varity, *supra* and In re Childress, *supra*. But this communication – mandated by ERISA – is the same communication that C.C. Mid West asserts constituted "tortious

interference" under state law. This creates a conflict between federal and state law (at least as applied and interpreted by C.C. Mid West).

In some cases it may be difficult to determine whether a particular state law "relates to" or has "connection with" an ERISA plan, within the meaning of the broad ERISA preemption provision. This is not such a case. Where, as here, there is an **actual conflict** between the demands of ERISA and state law (at least as interpreted by C.C. Mid West), there can be no doubt that the state law "relates to" and has a "connection with" the ERISA Plan. Indeed, even without the express statutory preemption provision in ERISA Section 514(a) (29 U.S.C. § 1144(a)), the United States Constitution would compel preemption in this case. The express ERISA preemption provision **broadens** the scope of preemption, and most certainly operates to preempt state law applications that would be preempted as a matter of constitutional law (because there is an actual conflict between state and federal law) even in the absence of the preemption clause.[16]

C.C. Mid West also tries to wiggle out of the conflict between federal law and state law by suggesting that the Pension Fund's fiduciaries did not actually make a decision concerning employee benefits in this case. C.C. Mid West cites material outside their Complaint – the deposition of Thomas Nyhan, the Pension Fund's General Counsel – to support this proposition. (C.C. Mid West Brief, p 42.) They claim that the Central Transport employees were "terminated," and not "laid off," and that under the Pension Fund's Plan Document "terminated" employees could

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[16] C.C. Mid West completely misses the point of conflict preemption. It suggests that there should be no concern about "conflicting" regulation of ERISA plans because there is uniformity among the various states' common law doctrines of tortious interference. (C.C. Mid West Brief, p. 37.) As the authorities cited above make clear, conflict preemption is primarily concerned with conflicts **between federal law and state law;** uniformity of application of federal policies is a secondary and derivative concern of federal preemption.

never qualify for self-contributions (regardless of whether they went to work for C.C. Mid West or another CenTra affiliate). On this basis, C.C. Mid West asserts that the unavailability of self-contributions was a foregone conclusion, and there was no benefits decision to be made.

But the evidence cited by C.C. Mid West shows that as of January 1998 (after this action was filed), Mr. Nyhan believed that "the [Central Transport shutdown] agreement that was actually arrived at provided that the employees would maintain their employee status [i.e., that the employees would be deemed 'laid-off' and not 'terminated']." C.C. Mid West's Apx. 84a, Nyhan Dep, p. 165. Moreover, the actual language of the May 7, 1997 letter attached to the Complaint, the letter forming the entire basis of C.C. Mid West's tortious interference claim, only states that "those participants who are on lay-off status as a result of Central Transport, Inc.'s shutdown" will be permitted to make self-contributions, except for any period that they are performing work for an affiliate of CenTra, such as C.C. Mid West. (Emphasis added.)

The May 7, 1997 letter addresses a separate circumstance impacting the ability of Central Transport employees to make self-contributions; this circumstance is independent of whether or not the former Central Transport drivers preserved their lay-off status – an issue about which, at certain times, there was ambiguity. The thrust of the benefit decision communicated to the participants in the May 7, 1997 letter is clear: If the participants are on lay-off status, then they qualify to make self-contributions, unless they resume work with a CenTra affiliate. This was the benefit decision made by the defendant fiduciaries, and, under ERISA, they were obliged to communicate that decision to the participants. The fiduciaries cannot be held liable under state law for taking an action that was compelled under ERISA.

Similarly, C.C. Mid West cannot avoid preemption by arguing that Defendants were not communicating plan benefit information to participants, but rather were using the communication as a pretext to harm C.C. Mid West's ability to contract with drivers. Whether the Defendants made truthful or fraudulent communications with plan participants, they still made communications, and those communications directly related to the benefits available under the Plan. The standard for measuring those decisions and communications does not change simply because, through artful pleading, a plaintiff contends that the ERISA fiduciary acted with a malicious intent, because alleging malicious intent is just another way of alleging that the ERISA fiduciary did not act in the sole interest of the plan participants.

Thus, in Farr, the Ninth Circuit specifically found that the ERISA fiduciaries had failed to disclose material information to plan participants because they were motivated by a selfish desire to improve their own economic situation at the expense of the plan participants. Farr v. U.S. West Communications, Inc., 151 F.3d 908 (9th Cir. 1999). Yet, this could not change the fact that ERISA preempted state common law fraud and misrepresentation claims because those claims arose out of, and related to, fraudulent communications made by ERISA fiduciaries.

That allegations of malice cannot avoid ERISA preemption is also demonstrated by the cases that have found that state tortious interference claims are preempted by ERISA. "Malice" is a core element of a claim for tortious interference; and yet, courts, including this Court, have routinely found that tortious interference claims are preempted by ERISA. *See infra* note 6.

The reason allegations of a malicious purpose cannot change the result is because any effort to determine whether an ERISA fiduciary acted for a proper or improper purpose necessarily requires an examination of how the ERISA plan has been administered. To do otherwise would require the Court to either ignore the

malicious purpose requirement or to assume, without support, that the plan fiduciaries made an improper decision. A claim of tortious interference cannot be maintained where the defendant acted out of a federal statutory obligation and acted properly – whatever the consequences to a third party.

C.C. Mid West attempts to argue, based on the decision in Darcangelo v. Verizon Communications, 292 F.3d 181 (4th Cir. 2002), that the improper conduct alleged here is so unrelated to the Plan that it cannot be termed "plan administration" of any sort. But Darcangelo proves precisely why the claims in this case should be preempted.

In Darcangelo, an employee sued his employer and the administrator of a disability benefits plan, asserting claims for invasion of privacy, negligence, breach of contract, and violations of Maryland's medical record confidentiality and unfair and deceptive trade practices statutes, on theory that administrator, as agent of employer, solicited and disseminated employee's private medical information in order to assist employer in its efforts to fire her. The Fourth Circuit held that the employee's breach of contract claim was preempted but that the other state law claims were not preempted because the administrator was not acting in an ERISA fiduciary capacity when it committed the allegedly tortious conduct:

> If CORE obtained Darcangelo's medical information in the course of processing a benefits claim or in the course of performing any of its administrative duties under the plan, these claims would be "related to" the ERISA plan under § 514 and would therefore be preempted. If, on the other hand, CORE was not performing any of its duties as plan administrator, but obtained the information solely to assist Verizon in establishing that Darcangelo posed a threat to her coworkers, then Darcangelo's first four claims would not be related to the plan. Reading the complaint in the light most favorable to Darcangelo, we conclude that she alleges conduct by CORE that is not related to its duties under the plan.

292 F.3d at 188.

The Fourth Circuit clearly distinguished the situation in Darcangelo from the situation in this case by the following language: "it is not apparent from Darcangelo's complaint that the conduct charged had anything to do with administering the employee benefits plan." 292 F.3d at 187.

Here, even reading the Complaint in the light most favorable to C.C. Mid West, the Fund defendants were performing administrative duties under the Plan. The May 7, 1997, letter attached as Exhibit A to the Complaint expressly states that the fiduciaries are communicating a decision about benefits to Fund participants: "The Trustees also agreed to permit [laid off Central Transport] participants ... to make self-contributions ... provided that self-contributions will not be accepted for any period during which a participant is performing work with [a CenTra affiliate]." C.C. Mid West's Apx. 9, Exhibit A to Complaint. Thus, as the Fourth Circuit recognized in Darcangelo, claims based on communications to participants — even if motivated by malice — "relate to" an ERISA plan and are preempted.

That Darcangelo does not support C.C. Mid West is further demonstrated by a recent decision, Clark v. BASF Corp., 229 F.Supp.2d 480 (W.D.N.C. 2002), which involved an employee's claims against his employer for breach of contract, unfair and deceptive trade practices, conversion, and fraud after his pension plan account and future benefits were reduced. The District Court found that the state law claims were preempted:

> In order for plaintiff herein to prevail on any of his claims, he would have to prove that a plan exists, he is a participant in such plan, and he is entitled to benefits under the plan. Griggs v. DuPont, supra, at 378. The linchpin to all of plaintiff's claims is that the actions of defendant reduced the amount of plaintiff's plan account and reduced the benefit he would be entitled to draw. The court in Griggs found a very similar claim to have a "sufficient 'connection with or reference to' DuPont's pension plan to warrant preemption." Id. at 379.

Clark, 220 F.Supp.2d at 485.

The District Court in Clark then distinguished Darcangelo:

> Unlike Darcangelo, the case *sub judice* has nothing to do with anything other than the management of this plaintiff's retirement plan. **Darcangelo simply reinforces the proposition that even common-law torts are subsumed by ERISA, so long as those torts were done in furtherance of a plan duty.** Thus, even if a plan administrator improperly determined the amount of creditable service or funds a plan participant was entitled to receive, and even if that determination was grossly unfair, a plaintiff's course and later cause of action would be governed exclusively by ERISA.

Id. at 489 (Emphasis added).

Here, reading the Complaint in the light most favorable to C.C. Mid West, the Fund's fiduciaries engaged in common law torts while purporting to act in furtherance of a plan duty, communicating with participants about benefits. Thus, even if the Fund's fiduciaries acted in a grossly unfair way, their actions are governed exclusively by ERISA; and, therefore, ERISA preempts C.C. Mid West's common law claims.

F. ERISA Itself Provides A Remedy For Fiduciary Misconduct; And, Therefore, There Is No Need To Allow State Law Claims — Even If This Means That C.C. Mid West Has No Remedy

C.C. Mid West complains that if its state law claims are preempted it would be left without a remedy.[15] Although C.C. Mid West could not pursue a claim against Plan defendants, Plan beneficiaries would have the right to make a claim. In fact, the basis of a beneficiary claim would be the same as C.C. Mid West's – the

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15 C.C. Mid-West's argument that it would be left without remedy is irrelevant. The law does not every plaintiff a remedy. In fact, the courts routinely deny plaintiffs access to a claim or grant remedy for various reasons including: governmental immunity; statute of limitations; and jurisdictional limitations. Foreclosure of a remedy for C.C. Mid-West is an issue for Congress, for it is Congress that has required ERISA's broad preemption of state law.

Plan defendants violated their fiduciary duties when it communicated a benefit determination to Plan participants. ERISA § 404 establishes an express prohibition against fiduciary misconduct, ERISA § 409 creates liability for any breach of those fiduciary duties, and ERISA § 502 provides express remedies for fiduciary misconduct. Further, the United States Department of Labor has specific authority to sue ERISA fiduciaries for breach of fiduciary obligation and can seek, among other relief, an order that the fiduciary make restitution to the plan for any losses resulting from the breach. ERISA § 401 *et seq.*; 29 U.S.C. § 1101 *et seq.* And ERISA § 501; 29 U.S.C. § 1131 provides substantial criminal penalties for violations of ERISA.

In 2002, in Rush Prudential HMO, the Supreme Court again confirmed that any state law "provid[ing] a form of ultimate relief in a judicial forum that add[s] to the judicial remedies provided by ERISA. . . . patently violates ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." 122 S. Ct. at 2166 (2002). *See also* Caffey v. UNUM Life Ins. Co., 302 F.3d 576, 582 (6th Cir. 2002).

Further, the fact that ERISA enforcement provisions do not allow third parties, such as C.C. Mid West, to assert claims for allegedly improper fiduciary conduct, is strong evidence that Congress never intended to authorize such relief. *See* Pilot Life, 481 U.S. at 54 (carefully integrated ERISA civil enforcement provisions "provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly"); Providence Hospital, 162 Mich. App. at 198 (citing Pilot Life, Farr, Muse, and Zuniga).

Zuniga, 52 F.3d at 1395, involved a claim by a doctor against an ERISA plan and ERISA fiduciary alleging that its decision to deny benefits to his patients had harmed the doctor. The doctor sued under state law because he had no standing to

sue under ERISA. He claimed that ERISA did not preempt his state law claim precisely because he had no ERISA remedy. The Sixth Circuit rejected this argument finding that, no matter how he characterized his claim, he was challenging benefit determinations. The Sixth Circuit added:

> That is exactly what Zuniga seeks here, the payment of benefits under the plan for his treatment of covered patients. Further, ERISA's civil enforcement provision clearly provides this type of remedy. ERISA § 502, 29 U.S.C. § 1132. Although the remedy is not available to Zuniga, that does not mean that no remedy exists.

52 F.3d at 1401.

Other cases have also found that state law claims were preempted even though the plaintiffs were left without any remedy. For example, in Farr, 151 F.3d at 915, the Ninth Circuit found that ERISA preempted state law claims for fraud and negligent representation, arising out of trustees' communications with plan participants, even though this meant that the plaintiffs would have no remedy under either ERISA or state law.

In Muse v. International Business Machines Corp., 103 F.3d 490, 495 (6th Cir. 1996), the Sixth Circuit affirmed a judgment dismissing state law claims that an ERISA fiduciary misrepresented benefits available under plan. In doing so, the Sixth Circuit stated: "The nature of ERISA preemption is not altered by the fact that some plaintiffs may be left without a meaningful remedy." *See also* Massachusetts Cas. Ins. Co. v. Reynolds, 113 F.3d 1450, 1454, n. 2 (6th Cir. 1997) (rejecting notion that "ERISA does not preempt state law claims when there is no adequate remedy under ERISA.").

Occasionally ERISA preemption has the effect of depriving pension plan participants – the very persons whom ERISA was designed to protect – of a remedy under state law (or even under ERISA) for fraud or misrepresentation. See, e.g., Lister v. Stark, 890 F.2d 941, 946 (7th Cir.) cert. denied, 498 U.S. 982 (1989) ("while our holding will leave [plaintiff] without a remedy, the availability of a federal

remedy is not a prerequisite for federal preemption"); Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir. 1989) (preempting plaintiff's state law claims despite recognition that employer's misrepresentation was a "betrayal without a remedy"). Juntunen v. Blue Cross/Blue Shield of Michigan, 30 Emp. Ben. cases 2839, 2003 WL 21246638 (Mich. App. 2003) (plan participant's tortious interference and consumer fraud claims preempted by ERISA). C.C. Mid West is **not** a party that falls within the special interest or protection of ERISA, and therefore it is in no way surprising or anomalous that ERISA preemption has an impact on its potential state law claims. Precisely because C.C. Mid West is **not** party to an ERISA plan, and is not a party that falls under ERISA's protection, C.C. Mid West has less cause to complain that ERISA has circumscribed what it sees as its law remedies. Cf. Admin. Committee of Walmart Stores Health Plan v. Varco, 338 F.3d 680, 692 (7th Cir. 2003) (claim by an attorney (as a non-ERISA party) under the "common fund" doctrine for reimbursement for benefit conferred on an ERISA held preempted and barred by ERISA, where that claim conflicted with the ERISA plan terms).

III. The Fact the C.C. Mid West Is Not An "ERISA Entity" Does Not Preclude the Preemption Of Its State Law Claims Under ERISA

C.C. Mid West also cites several cases where courts have found that claims that were not sufficiently related to traditional "ERISA entities" were not preempted: Thrift Drug v. Universal Prescription Administrators, 131 F.3d 95 (2nd Cir. 1997); Aetna Casualty and Surety Co. v. William M. Mercer, Inc., 173 F.R.D. 235 (N.D. Ill 1997); Strehl v. Case Corp., 1997 WL 695729 (N.D. Ill 1997). Those cases, properly read, do not support C.C. Mid West. Instead, they also demonstrate that claims that involve ERISA fiduciaries making decisions about benefits or communicating with participants are preempted.

In Thrift Drug, a pharmacy sued a prescription benefits plan administrator for breach of contract, alleging that the plan failed to reimburse the pharmacy for

dispensed prescriptions. In rejecting defendant's argument that the pharmacy's claim was preempted by ERISA, the court stated that plaintiff's breach of contract claim "[related] only to the contractual relationship between a plan and its service provider and [did] not remotely touch upon the relationship between the plan and its beneficiaries." 131 F.3d at 98. Here, however, C.C. Mid West's claim relates directly to the relationship between a plan administrator *and its beneficiaries.* Even if C.C. Mid West is not seeking to recover directly from the fund, its claim relies on the communication between a plan and its beneficiaries, and is thus clearly distinguishable from the situation in Thrift Drug.

Similarly, in Aetna, an insurer of an ERISA fund brought state law claims for negligence, breach of contract, and contribution against the fund's nonfiduciary actuary. Defendant, in an attempt to persuade the court that plaintiff's state law claims were preempted under ERISA, argued that plaintiff "stood in the shoes" of the fund beneficiaries in the action. In rejecting this argument, the court reasoned that resolution of plaintiff's claims focused on the relationship between defendant and the fund, and not between defendant and the fund beneficiaries. In other words, because the state law claims addressed services provided by an outside consultant to the Fund pursuant to a contract, plaintiff's state law claims were not preempted by ERISA.

Here, C.C. Mid West's claims rely on the relationship and communications between an ERISA fund and its beneficiaries and, thus, are clearly distinguishable from the claims in Aetna. This is evident by the fact that to arguably avoid C.C. Mid West's claim, the Plan would have had to make a different decision about participants' ability to self-contribute.

In Strehl, a chiropractor sued an insurance company for defamation, after the company sent a letter denying a request for reimbursement to one of the chiropractor's patients stating that he had rendered treatment outside the scope of

his license. The insurance company argued that because plaintiff's state law claim was essentially one for benefits under a plan governed by ERISA, it should be preempted. In rejecting the insurance company's argument the state law claims "relate[d] to" an ERISA plan, the court reasoned that plaintiff,

> does not seek plan benefits, nor does his claim rely on any obligations that arise under the plan. Furthermore, his claim does not implicate a relationship among ERISA entities, nor will enforcement of his claim disrupt ERISA's comprehensive regulatory scheme.

Strehl, 1997 WL 695729 at *3.

Thus, the court held that even though plaintiff's state law claim would not have arisen "but for the existence" of the ERISA plan, it was not preempted by ERISA.

In contrast, C.C. Mid West's state law claims here challenge the actions of the Fund fiduciaries in administering the Fund; and, thus, it would hold the fiduciaries liable, under state law, for exercising their ERISA duties. Indeed, as Paragraph 30 of the Complaint makes clear, the ERISA fiduciaries could only escape liability for common law claims if they accepted "self-contributions" from plan participants in order to make those plan participants eligible for increased benefits from the plan. Thus, Strehl provides no support for C.C. Mid West's argument.

Thus, the fact that C.C. Mid West brings this claim as a non-ERISA entity does not preclude the preemption of its state law claims under ERISA because they directly related to the administration of an ERISA plan.

CONCLUSION AND RELIEF REQUESTED

This Court should affirm the Court of Appeals because ERISA preempts C.C. Mid West's common law claims.

Respectfully submitted,

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